

## The Honorable Robert S. Lasnik

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

STEVE BELL,

Case No. CV 09-150-RSL

Plaintiff,

PLAINTIFFS RESPONSE TO PARTIAL  
MOTION TO DISMISS FILED BY  
DEFENDANT TWIN CAPITAL

INDYMAC BANK, et al.,

## Defendants.

Plaintiff hereby responds to the Partial Motion to Dismiss filed by Defendant Steve Bell

## I. FACTS

Plaintiff Steve Bell articulated the factual basis for his claims in drafting his Complaint with the particularity necessary to identify the claims and the facts which support them. Defendant Twin Capital has chosen only certain portions of Mr. Bell's Factual Allegations to recite to this Court in an effort at distorting Mr. Bell's allegations. In short, Mr. Bell maintains that Defendant Twin Capital lied to him and deceived him about the loan terms, and that he was required to pay fees to this Defendant which were false (including fees that were not actually incurred by this Defendant) and which were not disclosed in advance of the making of the loan

1 in compliance with the laws of the State of Washington. The Good Faith Estimate provided to  
 2 Mr. Bell regarding the first mortgage loan indicated indicates that Defendant Twin Capital will  
 3 be paid **\$2,819.00** for broker compensation, **\$765.00** as an administration fee, **\$499.00** as a  
 4 “loan doc set-up fee” and **\$189.00** as a courier fee. Mr. Bell did contend that numerous of  
 5 these fees were improperly included because they were not actually incurred by Defendant  
 6 Twin Capital. But more importantly, the GFE falsely stated that Mr. Bell would have an  
 7 interest rate of 2.15% and it did not indicate that Defendant IndyMac Bank would pay  
 8 Defendant Twin Capital a yield spread premium in the amount of **\$11,880.00** for placing him in  
 9 a higher interest rate loan. Defendant Twin Capital also charged Mr. Bell the disclosed broker  
 10 fee and administrative fee. Further, Defendant Twin Capital charged Mr. Bell an underwriting  
 11 fee of **\$895.00**, and processing fee of **\$875.00**, and neither of these fees were disclosed in the  
 12 original GFE. These fees also exceeded the previously disclosed fees, and Defendant Twin  
 13 Capital did not redisclose these increased charges to Mr. Bell in advance of the loan signing, as  
 14 required by Washington law. Complaint at 5:1-12.

17       Also without providing Mr. Bell with any other disclosures or GFEs, Defendant Twin  
 18 Capital also charged Mr. Bell **\$345.00** for an application fee, **\$247.50** as an origination fee and  
 19 **\$495.00** as a broker fee on the second mortgage loan. Complaint at 5:1-12. None of the GFEs  
 20 indicated that Mr. Bell had a prepayment penalty on the loans, and yet both loans had such a  
 21 penalty. Defendant Twin Capital also arranged for the escrow to handled by an agent that was  
 22 not licensed to conduct business in the State of Washington so that an uninformed traveling  
 23 notary came to his home to conduct the signing which resulted in Mr. Bell not having any of  
 24 the required or correctly filled out documentation after the loan signing. Complaint at 6:1-15.  
 25 The totality of the lies and deception in which Defendant Twin Capital engaged during the

1 making of this loan resulted in all of the damage which Mr. Bell has suffered.

## II. ISSUES

A. Should this Court dismiss Mr. Bell's claims of intentional infliction of emotional distress?

### **III. ARGUMENT AND AUTHORITY**

**A. Mr. Bell's claim for intentional infliction of emotional distress under Washington law has been sufficiently pled.**

Mr. Bell was not required to identify each and every single fact in existence in support his claims under the laws of the State of Washington, where the Complaint was originally filed or even under federal law. In considering a motion under the Federal Rules of Civil Procedure 12(b)(6), the court must “(1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief.” Schwarzer, Tashima & Wagstaffe, RUTTER GROUP PRAC. GUIDE: FED. CIV. PRO. BEFORE TRIAL (The Rutter Group 2006) 9:187, citing to *Cahill v. Liberty Mut. Ins. Co.*, (9<sup>th</sup> Cir. 1996) 80 F.3d 336, 337-338; *Vector Research, Inc. v. Howard & Howard Attorneys, P.C.* (6<sup>th</sup> Cir. 1996) 76 F.3d 692, 697. A Rule 12(b)(6) dismissal is proper only in “extraordinary” cases. *U.S. v. Redwood City* (9<sup>th</sup> Cir. 1981) 640 F.2d 963, 966.

Mr. Bell agrees with the Defendant's assertion that the claims of outrage and intentional infliction of emotional distress are one and the same under Washington law. Motion at 5:2-3, citing to *Snyder v. Medical Serv. Corp. of Eastern WA*, 98 Wash. App. 315, 321, 988 P.2d 1023 (1999). However, Mr. Bell maintains that the standard for proving a claim for outrage in Washington is best articulated in *Kloepfel v. Bokor*, 149 Wn.2d 192 (2003). The Washington

**PLAINTIFFS RESPONSE TO DWACHOVIA  
DEFS' MOTION TO DISMISS**

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1 distress in the *Kloepfel* decision, reaching back to a long line of other cases examining the  
 2 issue, including *Reid v. Pierce County*, 136 Wn.2d 195, 202 (1998); *Shoemaker v. St. Joseph*  
 3 *Hosp. & Health Care*, 56 Wn.App. 575 (1990); *Grimsby v. Samson*, 85 Wn.2d 52 (1975) and  
 4 *Schurk v. Christensen*, 80 Wn.2d 652 (1972).

5       In order to prove a claim of outrage, a plaintiff must show that there was (1) extreme  
 6 and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3)  
 7 actual result to the plaintiff of severe emotional distress. *Kloepfel v. Bokor*, 149 Wn.2d 192,  
 8 196, 66 P.3d 630 (2003). Conduct that is “so outrageous in character, and so extreme in  
 9 degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and  
 10 utterly intolerable in a civilized community” will constitute intentional infliction of emotional  
 11 distress. *Id.* (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)), (quoting  
 12 *Restatement (Second) of Torts* §46 cmt. d); *see also, Reid v. Pierce County*, 136 Wn.2d 195,  
 13 202, 961 P.2d 333 (1998); *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989); *Rice*  
 14 *v. Janovich*, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987).

15       Following a careful analysis of the history of the torts of intentional and negligent  
 16 infliction of emotional distress, the *Kloepfel* Court noted that,

17           [T]he difference in focus in these cases is based upon the intent behind the  
 18 defendants’ acts. “The distinction between negligence and intentional torts is  
 19 related to the difference in fault. Society through its courts has a “definite  
 20 tendency to impose greater responsibility upon a defendant whose conduct was  
 21 intended to do harm or was morally wrong.” *Prosser and Keaton on the Law of*  
 22 *Torts* § 8 at 37 (W. Page Keeton, et al. eds., 5<sup>th</sup> ed. 1984).

23       *Kloepfel*, 149 Wn.2d at 200. Emotional distress symptomatology is defined in the *Restatement*  
 24 *of Torts* as including “all highly unpleasant mental reactions, such as fright, horror, grief,  
 25 shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea.” It is  
 26 distress that “no reasonable man could be expected to endure.” *Kloepfel* at 200. Here, the

1 stress of facing the loss of his home right after acquiring it because of the false information he  
 2 received regarding the loan terms is sufficient to provide support for a claim of outrage.  
 3 Certainly, before this Court dismisses Mr. Bell's claims, he should be afforded the opportunity  
 4 to, at the very least, amend his complaint in order to articulate in that document his reaction to  
 5 these lending practices and its impact upon his life.  
 6

7       1.     The Complaint meets the “intent” requirement in the outrage cause of action.

8       Defendant Twin Capital incorrectly asserts that Mr. Bell is required to prove that it  
 9 acted intentionally to cause his emotion distress in order to prevail upon the claim. Motion at  
 10 6:1-9. Rather, the tort of outrage requires that the plaintiff prove that the defendant acted  
 11 intentionally to commit the complained of act. As noted in *Kloepfel*, courts have long held  
 12 defendants liable for outrage for acts that are “morally wrong”. *Kloepfel*, 149 Wn.2d at 200.  
 13 Certainly, the actions of Defendant Twin Capital were “morally wrong” and it is reasonable to  
 14 conclude that the financial harm from entering into mortgage loans with markedly different  
 15 loan terms than were promised from the outset, and the resultant stress and physical response,  
 16 could have been anticipated by Defendant Twin Capital. Here, Mr. Bell has clearly articulated  
 17 in his Complaint the very specific repeated and false statements made by its loan officer which  
 18 induced him to enter into a mortgage loan with completely different loan terms than those  
 19 which were provided to Mr. Bell by the loan officer. Complaint at 5:1-12. Defendant Twin  
 20 Capital, acting through its loan officer, intended to induce Mr. Bell to enter into the loans so  
 21 that it could receive payment for brokering the loans, and that was its only concern.

22       Defendant Twin Capital next asserts, without any legal authority in support of its  
 23 position, that because Mr. Bell did the right thing – made the payments on the mortgage loans  
 24 for two years even though he had been defrauded and deceived – he has somehow waived any  
 25 right to make claims relating to the making of those loans. Since Mr. Bell's claims against  
 26 Defendant Twin Capital were made well within the relevant statute of limitations, this

1 argument is without legal support. Mr. Bell has timely brought his legal claims and there is  
2 nothing which precludes his bringing of those claims or supports an assertion that he waived  
3 his right to pursue those claims.

4 **IV. CONCLUSION**

5 For all of the above reasons, the Partial Motion to Dismiss Mr. Bell's claim of outrage  
6 should be denied in its entirety. In the alternative, Mr. Bell should be afforded the opportunity  
7 to provide the Court with a specific description of the emotional harm that he has suffered as a  
8 result of the actions of Defendant Twin Capital.

9 DATED this 2<sup>nd</sup> day of October, 2009.

10  
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13  
14 /s/ Melissa A. Huelsman  
15 Melissa A. Huelsman, WSBA No. 30935  
16 Attorney for Plaintiff  
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